

DON DWYER DEVELOPMENT COMPANY,

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AGBCA No. 2002-153-R

Appellant

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Representing the Appellant:

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RULING ON APPELLANT-S MOTION FOR RECONSIDERATION

November 14, 2002

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK. Dissenting Opinion by Administrative Judge VERGILIO.

This appeal arises out of Contract No. 054038, Addington Fire Salvage, a salvage timber sale between Don Dwyer Development Company (Dwyer) and the U.S. Department of Agriculture, Forest Service (FS), Stonyford Ranger District, Medocino National Forest (NF), Willows, California. On September 5, 2002, the Board issued a decision in the appeal, Don Dwyer Development Company, AGBCA No. 2000-107-1, 02-2 BCA & 31,980, granting Appellant partial recovery in the amount of \$25,648 plus CDA interest for timber value lost attributable to blue stain. Under cover letter of September 13, 2002, Appellant filed a Motion for Reconsideration where it asked the Board to correct what Appellant characterized as a clerical error in setting out the amount due Dwyer. Appellant pointed out that on page 46 of the decision, the Board allowed \$25,648. However, at page 41, the Board had identified the sum to which Appellant was entitled as \$29,072. Appellant stated that there was no calculation which supported the award of the lower figure.

Upon receipt of the Motion, the Board gave the Government an opportunity to respond. By letter of October 22, 2002, the Government advised the Board that it did not intend to file any pleading in response to Appellant's Motion.

We have reviewed the September 5, 2002 decision and conclude that a clerical error was made and that the proper recovery should have been \$29,072.

As to the dissent, we disagree with the use of the word *manipulate*, as applied to the majority calculation of quantum. Otherwise, we see no reason to comment on the remainder of the dissent.

DECISION

Appellant's motion is granted and Appellant is entitled to \$29,072 plus CDA interest, in lieu of the \$25,648 granted in the underlying decision in this appeal.

HOWARD A. POLLACK

Administrative Judge

Concurring:

ANNE W. WESTBROOK

Administrative Judge

Dissenting Opinion by Administrative Judge VERGILIO.

I respectfully dissent from the decision of the majority to amend the decision to award the purchaser \$29,072. My reasons expressed in dissent in the underlying decision have not changed, such that I remain of the view that the purchaser is entitled to no relief. On the issue of reconsideration to correct what is said to be an error, I find that the calculations used by the majority lack a rational basis and represent but a manipulation of numbers.

The majority states that because 15% of the represented bright timber was expected by Dwyer to turn blue over the life of the contract, we apply that 15% to the 644 MBF noted above. Based upon my reading of the record, the correct figure for anticipated blue stain is based not upon 644 MBF (the bright timber at the time of award), but rather 377 MBF which is one-third of the 1131 MBF of timber harvested, which Dwyer expected to remain for harvest in 1998 (FF 22). This means that, at

the time of award, the purchaser anticipated 56.55 MBF (15% of 377 MBF) of blue stain, thereby underestimating the total blue-stained timber harvested. Alternatively, because he harvested timber later than expected, one could apply the 15% to the total harvest of 1131 MBF to derive the figure of 169.65 MBF of anticipated blue stain at the time of harvesting. I discern no basis to support the calculations of the majority in deriving the result.

JOSEPH A. VERGILIO

Administrative Judge

Issued at Washington, D.C.

November 14, 2002